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WASHINGTON, D.C. 20544

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TO: Honorable Joseph F. Weis, Jr. Chair  
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jon O. Newman, Chair  
Advisory Committee on Appellate Rules

SUBJECT: Responses to publication in September 1989 of the preliminary draft of proposed amendments to the Federal Rules of Appellate Procedure, and request to correct typographical errors in two other rules.

DATE: June 15, 1990

The Advisory Committee on Appellate Rules asks that the Standing Committee delay action on the proposed amendment to Fed. R. App. P. 4(a), allowing time for the Advisory Committee to reconsider the amendment in light of the comments received from the public, some of which expressed strong opposition to the proposal. The Advisory Committee requests that the Standing Committee approve the amendments to Fed. R. App. P. 28(a), (b), and (h), 30(b), and 34(d) and forward those rules to the Judicial Conference. In addition, the Advisory Committee requests that the Standing Committee approve corrections to typographical errors in the caption to Fed. R. App. P. 10(c) and in the text of Rule 26.1 and forward those corrections to the Judicial Conference without prior publication and comment.

With regard to Rules 28(a), (b), and (h), 30(b), and 34(d), the Advisory Committee considered all communications received from interested individuals and groups who responded to the Committee's request for comment. Correction of typographical errors, changes in punctuation, and changes in language for clarification have been made.

The changes made by the Advisory Committee subsequent to the original publication of the rules in September 1989 are:

**Rule 28(a)(2) A statement of subject matter and appellate jurisdiction.**

The typographical error on line 6 has been corrected so that the parenthetical reads as follows: "(ii)". On line 11 "(a)" has been inserted before the word shall, and on line 13 the word "it" (when published, "it" was incorrectly typed as "if") has been deleted and "(b)" has been inserted in its place before the word shall. Line 13 now reads as follows: "with respect to all parties or, if not, (b) shall include information".

**Rule 28(b) Brief of the appellee.**

On line 32, a dash has been inserted between the parenthesis following the number one and the parenthesis preceding the number 5, so that an appellant is required to comply with subdivisions (a)(1)-(5). A comma has been inserted on line 32 following the word jurisdiction. The comma should be underlined, indicating that it is being added to the original text of Fed. R. App. P. 28(b).

**Rule 28(h) Briefs in cases involving cross appeals.**

On line 38 the word "simultaneously" has been replaced with the following phrase: "on the same day". The first sentence now reads, "If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below, shall be deemed the appellant for purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders." In keeping with that change the fifth sentence of the advisory committee note has been changed to say: "If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant."

**Rule 30 (b) Determination of contents of appendix; cost of producing.**

On line 13 the hyphen has been deleted between the words cross and appeal; this is consistent with treatment elsewhere in the rules. Although not really a change, there is a typographical error in the rule as printed for publication. On line 22 the last word on the line should be "issues".

**Rule 34(d) Cross and separate appeals.**

On line 5 the word "simultaneously" should be changed to "on the same day". This change conforms to the change made in Rule 28(h).

**New Proposals**

In addition to the rules that have already been published for comment, the Advisory Committee on Appellate Rules submits three amended rules for approval of the Standing Committee.

The first amendment adds a sentence dealing with electronic filing to Fed. R. App. P. 25(a). The proposal generally follows the language proposed by the Judicial Improvements Committee. The new sentence permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes the use of facsimile or other electronic technology in the courts. The language of the proposal differs slightly from that proposed by the Judicial Improvements Committee. The Judicial Improvements Committee suggested that local rules allowing electronic filing could be adopted "provided such means are authorized by regulations promulgated by the Judicial Conference . . . ." The Advisory Committee believes i) that the Judicial Conference may wish to establish standards for electronic filing that may be broader than "authorization"; ii) "promulgating regulations" is a term of art that may entail more procedural formalities than are necessary to establish the sort of standards needed here. Therefore, the proposal substitutes the following language for that quoted above: "provided such means are authorized by and are consistent with standards established by the Judicial Conference of the United States."

The other two amendments involve only correction of typographical errors; therefore, the Advisory Committee believes that the changes may be submitted to the Judicial Conference without prior publication.

One amendment changes the second word in the caption of Fed. R. App. P. 10(c) from "on" to "of". The caption should read: "Statement of the evidence or proceedings. . ."

The other amendment deletes the word "body" from the first sentence of the text of Fed. R. App. P. 26.1. The sentence should begin, "Any non-governmental corporate party . . ." not "Any non-governmental corporate body party . . ."

PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF APPELLATE PROCEDURE\*

Rule 4. Appeal as of right--When taken

1 (a) Appeals in civil cases.

2 \* \* \* \* \*

3 (6) The district court, if it finds (a) that  
4 a party entitled to notice of the entry of a  
5 judgment or order did not receive such notice from  
6 the clerk or any party within 21 days of its entry  
7 and (b) that no party would be prejudiced, may,  
8 upon motion filed within 180 days of entry of the  
9 judgment or order or within 7 days of receipt of  
10 such notice, whichever is earlier, reopen the time  
11 for appeal for a period of 14 days from the date of  
12 entry of the order reopening the time for appeal.

13 ~~(6)~~ (7) A judgment or order is entered within  
14 the meaning of this Rule 4(a) when it is entered in  
15 compliance with Rules 58 and 79(a) of the Federal  
16 Rules of Civil Procedure.

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\*New matter is underlined; matter to be omitted is  
lined through.

## COMMITTEE NOTE

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

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Transmittal Note: Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule.

Rule 6. Appeals in bankruptcy cases from final ~~judgements~~ judgments and orders of district courts or of bankruptcy appellate panels

\* \* \* \* \*

Rule 10. The record on appeal

\* \* \* \* \*

1           (c)       Statement ~~on~~ of the evidence or  
2       proceedings when no report was made or when the  
3       transcript is unavailable.--If no report of the  
4       evidence or proceedings at a hearing or trial was  
5       made, or if a transcript is unavailable, the  
6       appellant may prepare a statement of the evidence  
7       or proceedings from the best available means,  
8       including the appellant's recollection.     The  
9       statement shall be served on the appellee, who may  
10      serve objections or proposed amendments thereto  
11      within 10 days after service.     Thereupon the  
12      statement and any objections or proposed amendments  
13      shall be submitted to the district court for

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14 settlement and approval and as settled and approved  
15 shall be included by the clerk of the district  
16 court in the record on appeal.

Rule 25. Filing and service

1 (a) *Filing.*--Papers required or permitted to  
2 be filed in a court of appeals shall be filed with  
3 the clerk. Filing may be accomplished by mail  
4 addressed to the clerk, but filing shall not be  
5 timely unless the papers are received by the clerk  
6 within the time fixed for filing, except that  
7 briefs and appendices shall be deemed filed on the  
8 day of mailing if the most expeditious form of  
9 delivery by mail, excepting special delivery, is  
10 utilized. If a motion requests relief which may be  
11 granted by a single judge, the judge may permit the  
12 motion to be filed with the judge, in which event  
13 the judge shall note thereon the date of filing and  
14 shall thereafter transmit it to the clerk. A court  
15 of appeals may, by local rule, permit papers to be  
16 filed by facsimile or other electronic means,  
17 provided such means are authorized by and  
18 consistent with standards established by the  
19 Judicial Conference of the United States.

## COMMITTEE NOTE

Subdivision (a). The amendment permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes filing by facsimile or other electronic means.

## Rule 26. Computation and extension of time

1       (a) *Computation of time.*--In computing any  
2 period of time prescribed or allowed by these  
3 rules, by an order of court, or by any applicable  
4 statute, the day of the act, event, or default from  
5 which the designated period of time begins to run  
6 shall not be included. The last day of the period  
7 so computed shall be included, unless it is a  
8 Saturday, a Sunday, or a legal holiday, or, when  
9 the act to be done is the filing of a paper in  
10 court, a day on which weather or other conditions  
11 have made the office of the clerk of the court  
12 inaccessible, in which event the period runs until  
13 the end of the next day which is not one of the  
14 aforementioned days. When the period of the time  
15 prescribed or allowed is less than 7 days,  
16 intermediate Saturdays, Sundays, and legal holidays  
17 shall be excluded in the computation. As used in



18 this rule "legal holiday" includes New Year's Day,  
 19 Birthday of Martin Luther King, Jr., Washington's  
 20 Birthday, Memorial Day, Independence Day, Labor  
 21 Day, Columbus Day, Veterans Day, Thanksgiving Day,  
 22 Christmas Day, and any other day appointed as a  
 23 holiday by the President or the Congress of the  
 24 United States. It shall also include a day  
 25 appointed as a holiday by the state wherein the  
 26 district court which rendered the judgment or order  
 27 which is or may be appealed from is situated, or by  
 28 the state wherein the principal office of the clerk  
 29 of the court of appeals in which the appeal is  
 30 pending is located.

\* \* \* \* \*

**Rule 26.1. Corporate disclosure statement**

1 Any non-governmental corporate ~~body~~ party to  
 2 a civil or bankruptcy case or agency review  
 3 proceeding and any non-governmental corporate  
 4 defendant in a criminal case shall file a statement  
 5 identifying all parent companies, subsidiaries  
 6 (except wholly-owned subsidiaries), and affiliates  
 7 that have issued shares to the public. The  
 8 statement shall be filed with a party's principal  
 9 brief or upon filing a motion, response, petition

10 or answer in the court of appeals, whichever first  
11 occurs, unless a local rule requires earlier  
12 filing. The statement shall be included in front  
13 of the table of contents in a party's principal  
14 brief even if the statement was previously filed.

#### Rule 28. Briefs

1 (a) *Brief of the appellant.*

2 \* \* \* \* \*

3 (2) A statement of subject matter and  
4 appellate jurisdiction. The statement shall  
5 include: (i) a statement of the basis for subject  
6 matter jurisdiction in the district court or  
7 agency, with citation to applicable statutory  
8 provisions and with reference to the relevant facts  
9 to establish such jurisdiction; (ii) a statement of  
10 the basis for jurisdiction in the court of appeals,  
11 with citation to applicable statutory provisions  
12 and with reference to the relevant facts to  
13 establish such jurisdiction; the statement shall  
14 include relevant filing dates establishing the  
15 timeliness of the appeal or petition for review and  
16 (a) shall state that the appeal is from a final  
17 order or a final judgment that disposes of all

18 claims with respect to all parties or, if not, (b)  
19 shall include information establishing that the  
20 court of appeals has jurisdiction on some other  
21 basis.

22 ~~(2)~~ (3) A statement of the issues  
23 presented for review.

24 ~~(3)~~ (4) A statement of the case. The  
25 statement shall first indicate briefly the nature  
26 of the case, the course of proceedings, and its  
27 disposition in the court below. There shall follow  
28 a statement of the facts relevant to the issues  
29 presented for review, with appropriate references  
30 to the record (see subdivision (e)).

31 ~~(4)~~ (5) An argument. The argument may  
32 be preceded by a summary. The argument shall  
33 contain the contentions of the appellant with  
34 respect to the issues presented, and the reasons  
35 therefor, with citations to the authorities,  
36 statutes and parts of the record relied on.

37 ~~(5)~~ (6) A short conclusion stating the  
38 precise relief sought.

39 (b) Brief of the appellee.--The brief of the  
40 appellee shall conform to the requirements of  
41 subdivisions (a)(1)-~~(4)~~ (5), except that a

42 statement of jurisdiction, of the issues, or of the  
43 case need not be made unless the appellee is  
44 dissatisfied with the statement of the appellant.

45 \* \* \* \* \*

46 (h) Briefs in cases involving cross appeals.-  
47 -If a cross appeal is filed, the plaintiff in the  
48 court below the party who first files a notice of  
49 appeal, or in the event that the notices are filed  
50 on the same day, the plaintiff in the proceeding  
51 below, shall be deemed the appellant for the  
52 purposes of this rule and Rules 30 and 31, unless  
53 the parties otherwise agree or the court otherwise  
54 orders. The brief of the appellee shall contain  
55 the issues and argument involved in his conform to  
56 the requirements of subdivision (a)(1)-(6) of this  
57 rule with respect to the appellee's cross appeal as  
58 well as the answer respond to the brief of the  
59 appellant except that a statement of the case need  
60 not be made unless the appellee is dissatisfied  
61 with the statement of the appellant.

#### COMMITTEE NOTE

Subdivision (a). The amendment adds a new subparagraph (2) that requires an appellant to include a specific jurisdictional statement in the appellant's

brief to aid the court of appeals in determining whether it has both federal subject matter and appellate jurisdiction.

Subdivision (b). The amendment requires the appellee to include a jurisdictional statement in the appellee's brief except that the appellee need not include the statement if the appellee is satisfied with the appellant's jurisdictional statement.

Subdivision (h). The amendment provides that when more than one party appeals from a judgment or order, the party filing the first appeal is normally treated as the appellant for purposes of this rule and Rules 30 and 31. The party who first files an appeal usually is the principal appellant and should be treated as such. Parties who file a notice of appeal after the first notice often bring protective appeals and they should be treated as cross appellants. Local rules in the Fourth and Federal Circuits now take that approach. If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant. For purposes of this rule, in criminal cases "the plaintiff" means the United States. In those instances where the designations provided by the rule are inappropriate, they may be altered by agreement of the parties or by an order of the court.

### Rule 30. Appendix to the briefs

\* \* \* \* \*

1           (b) *Determination of contents of appendix;*  
2   *cost of producing.*--The parties are encouraged to  
3   agree as to the contents of the appendix. In the  
4   absence of agreement, the appellant shall, not  
5   later than 10 days after the date on which the  
6   record is filed, serve on the appellee a  
7   designation of the parts of the record which the

8 appellant intends to include in the appendix and a  
9 statement of the issues which the appellant intends  
10 to present for review. If the appellee deems it  
11 necessary to direct the particular attention of the  
12 court to parts of the record not designated by the  
13 appellant, the appellee shall, within 10 days after  
14 receipt of the designation, serve upon the  
15 appellant a designation of those parts. The  
16 appellant shall include in the appendix the parts  
17 thus designated with respect to the appeal and any  
18 cross appeal. In designating parts of the record  
19 for inclusion in the appendix, the parties shall  
20 have regard for the fact that the entire record is  
21 always available to the court for reference and  
22 examination and shall not engage in unnecessary  
23 designation. The provisions of this paragraph  
24 shall apply to cross appellants and cross  
25 appellees.

26 Unless the parties otherwise agree, the cost of  
27 producing the appendix shall initially be paid by  
28 the appellant, but if the appellant considers that  
29 parts of the record designated by the appellee for  
30 inclusion are unnecessary for the determination of  
31 the issues presented the appellant may so advise

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32 the appellee and the appellant shall advance the  
33 cost of including such parts. The cost of  
34 producing the appendix shall be taxed as costs in  
35 the case, but if either party shall cause matters  
36 to be included in the appendix unnecessarily the  
37 court may impose the cost of producing such parts  
38 on the party. Each circuit shall provide by local  
39 rule for the imposition of sanctions against  
40 attorneys who unreasonably and vexatiously increase  
41 the costs of litigation through the inclusion of  
42 unnecessary material in the appendix.

COMMITTEE NOTE

Subdivision (b). The amendment requires a cross appellant to serve the appellant with a statement of the issues that the cross appellant intends to pursue on appeal. No later than ten days after the record is filed, the appellant and cross appellant must serve each other with a statement of the issues each intends to present for review and with a designation of the parts of the record that each wants included in the appendix. Within the next ten days, both the appellee and the cross appellee may designate additional materials for inclusion in the appendix. The appellant must then include in the appendix the parts thus designated for both the appeal and any cross appeals. The Committee expects that simultaneous compliance with this subdivision by an appellant and a cross appellant will be feasible in most cases. If a cross appellant cannot fairly be expected to comply until receipt of the appellant's statement of issues, relief may be sought by motion in the court of appeals.

## Rule 34. Oral argument

\* \* \* \* \*

1           (d) *Cross and separate appeals.*--A cross or  
2 separate appeal shall be argued with the initial  
3 appeal at a single argument, unless the court  
4 otherwise directs. If a case involves a cross  
5 appeal, ~~the plaintiff in the action below~~ the party  
6 who first files a notice of appeal, or in the event  
7 that the notices are filed on the same day the  
8 plaintiff in the proceeding below, shall be  
9 deemed the appellant for the purpose of this rule  
10 unless the parties otherwise agree or the court  
11 otherwise directs. If separate appellants support  
12 the same argument, care shall be taken to avoid  
13 duplication of argument.

## Committee Note

Subdivision (d). The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).